

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

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

APR 07 2016

v.

BARRICK TURQUOISE RIDGE, INC.

:
:
:
:
:
:

Docket No. WEST 2015-898-M
A.C. No. 26-02286-383506

BEFORE: Jordan, Chairman; Nakamura, and Althen, Commissioners¹

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 September 9, 2015, the Commission received from Barrick Turquoise Ridge, Inc. (“Barrick”) 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).


¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 15, 2015, and became a final order of the Commission on July 15, 2015. Barrick asserts that safety and health group employees who were unfamiliar with the office's contest process failed to submit a contest form to MSHA. According to Barrick, these employees did not submit the contest form because they mistakenly assumed that Barrick's accounting office would send a contest form to MSHA, along with a check with payment for the citations that Barrick did not wish to contest. Barrick states that the safety staff did not understand that the accounting office's usual practice was only to send payments to MSHA, and not contest forms. Barrick further asserts that its timely partial payment reflects Barrick's intent to contest the penalty, and that as a result this case should not be in default even though a contest form was not filed within the thirty-day deadline.

The Secretary confirms that MSHA received a check dated July 13, 2015 in the amount of \$5,309. The Secretary also confirms that MSHA mailed a delinquency letter to Barrick on August 31, 2015. 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.

A timely partial payment is not sufficient to indicate the operator's intent to contest a citation and avoid a default. Having reviewed Barrick's request and the Secretary's response, however, we find that the actions of the safety and health group constitute a mistake that justifies relief. 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


Patrick K. Nakamura, Commissioner


William I. Althen, Commissioner

Distribution:

Margaret S. Lopez, Esq.
Lauren M. Marino, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006

W. Christian Schumann, 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