

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

WASHINGTON, DC 20004-1710

APR 28 2016

SECRETARY OF LABOR,	:	Docket Nos.	SE 2015-455-M
MINE SAFETY AND HEALTH	:		WEVA 2015-1014
ADMINISTRATION (MSHA),	:		VA 2016-18
	:		SE 2016-24-M
v.	:		CENT 2016-28-M
	:		KENT 2016-2
ALLSTATE MATERIALS, LLC, et al. ¹	:		WEVA 2015-996
	:		WEVA 2015-997

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). Between September 2 and October 26, 2015, the Commission received motions from the above-captioned operators seeking to reopen penalty assessments that had become final orders 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


¹ For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers SE 2015-455-M, WEVA 2015-1014, VA 2016-18, SE 2016-24-M, CENT 2016-28-M, KENT 2016-2, WEVA 2015-996, and WEVA 2015-997 involving similar procedural issues. 29 C.F.R. § 2700.12. For the sake of brevity, the relevant operators’ names, A.C. numbers, and associated docket numbers have been listed in Appendix A, attached to this order.

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

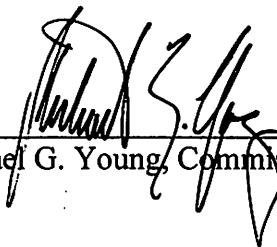
In all of these cases, the operators claim that they mailed timely notices of contest to the Arlington office of the Mine Safety and Health Administration (“MSHA”) at the address listed on the proposed assessment. The operators further contend that the contests were either lost in the mail or returned as undeliverable. The Secretary does not oppose reopening because of problems concerning mail delivery following the relocation of MSHA’s headquarters on July 15, 2015. In particular, MSHA maintains that the U.S. Postal Service has not consistently forwarded all of its mail to its new address.²

² Notice of the change in MSHA’s address was published in the Federal Register on September 2, 2015, nearly three months after MSHA moved its headquarters. 80 Fed. Reg. 52984-01. Additionally, we note that MSHA’s mailing address listed on the Notice of Contest Rights and Instructions included with proposed assessments and the Commission’s website were not up-to-date during the relevant time period. Insofar as the operators may have been confused by these documents, we find that their failure to timely contest the proposed penalties is excusable.

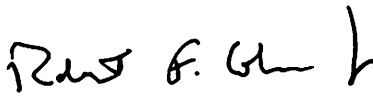
Having reviewed the requests to reopen and the Secretary's response, in the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, the Secretary shall file petitions for assessment of penalty in each case within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



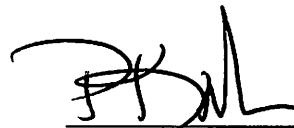
Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

Distribution:

James F. Bowman
P.O. Box 99
Midway, WV 25878

Charles Livingston
Livingston Aggregate, LLC
5870 County Rd. 21
Akron, AL 35441-225

Billy R. Shelton, Esq.
Jones, Walters, Turner & Shelton PLLC
2452 Sir Barton Way, Suite 101
Lexington, KY 40509

Chris Vaughn
Ozark Southern Stone
P.O. Box 40
Beaver, AR 72613

Michael T. Cimino, Esq.
Jackson Kelly, PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

David C. Powell
Allstate Materials, LLC
2708 Country Rd. 85
Deatsville, AL 36022

Clark Livingston
Livingston Aggregate, LLC
5870 County Rd. 21
Akron, AL 35441-2205

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St., South, Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

Exhibit 1

Operator	Docket Number	A.C. Number
Allstate Materials, LLC	SE 2015-455-M	01-03406-387911
Eastern Associated Coal, LLC	WEVA 2015-1014	46-01456-384741
Hills Coal Company, Inc.	VA 2016-18	44-03472-389324
Livingston Aggregate, LLC	SE 2016-24-M	01-03359-387668
Ozark Southern Stone	CENT 2016-28-M	03-01936-386157
Pine Branch Mining, LLC	KENT 2016-2	15-16883-383468
Raw Coal Mining Company	WEVA 2015-996	46-06265-383951
Sally Ann Coal Company	WEVA 2015-997	46-06843-383326