FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 2 8 2017

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

 \mathbf{V}_{\cdot}

Docket No. WEST 2016-108-M
A.C. No. 10-02214-388660

HNS, INC.

Docket No. WEST 2016-135-M
A.C. No. 10-02214-388660

•

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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"). On November 5, 2015, the Commission received from HNS, Inc. ("HNS") 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 another 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

¹ Upon review, it was determined that that citation had been mistakenly docketed twice, once in WEST 2016-108-M and again in WEST 2016-135-M. Accordingly, we hereby dismiss Docket No. WEST 2016-135-M as duplicative of Docket No. WEST 2016-108-M.

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 assessments in both proceedings were delivered on August 10, 2015, and became final orders of the Commission on September 9, 2015. HNS asserts that it inadvertently failed to contest the assessments because its secretary/treasurer was out of town during the summer in which the instant citations were issued. The employees at the mine were unaware that they were required to follow up with MSHA and contest the citations. As a result, the Notice of Contest was not filed until the secretary/treasurer returned to the mine. The Secretary does not oppose the request to reopen.

Having reviewed HNS' request and the Secretary's response, we find that the operator's failure to timely contest the citation herein was the result of inadvertent mistake. In the interest of justice, we hereby reopen Docket No. WEST 2016-108-M 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, Compassioner

12bit F. Why

Robert F. Cohen, Jr., Commissioner

Distribution:

Robert Hines Secretary/Treasurer HNS, Inc. 63830 Industrial Lane La Grande, OR 97850

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