FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 26 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2016-668-M
v.	:	A.C. No. 02-00144-370248 D113
UNITED RENTALS NORTHWEST	:	

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 October 20, 2015, the Commission received from United Rentals Northwest ("United Rentals") 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 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 January 2, 2015, and became a final order of the Commission on February 1, 2015.[1] United Rentals asserts that it never received the penalty assessment in this matter. The operator avers that it had contested the citation at issue, which was contained in Docket No. WEST 2016-225-RM, and was monitoring the mail for the assessment with intent to contest it as well. United Rentals claims that it had two employees tasked with responding to MSHA assessments and arranging for payments and that neither received the assessment here. The operator received no deficiency notice because MSHA applied an overpayment on an unrelated issue to satisfy the assessment in this matter. United Rentals asserts that it only learned of the assessment on September 14, 2015, when it received an Order to Show Cause in the contest docket stating that the assessment had been paid. United Rentals responded by filing the instant motion less than thirty days after receiving the Show Cause Order. The Secretary does not oppose the request to reopen.

Having reviewed United Rentals request and the Secretary's response, 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

[1] MSHA asserts the assessment became a final order "30 days after receipt on February 13, 2015." It further claims that delivery was made via USPS Certified Mail. However, there is no proof of "receipt" on January 2 or January 14, or other explanation for the calculation of the 30-day period.

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