

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

APR 30 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2014-57-M
v.	:	A.C. No. 26-01842-328683
	:	
BARRICK GOLD U.S., INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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 October 31, 2013, the Commission received from Barrick Gold U.S., 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).

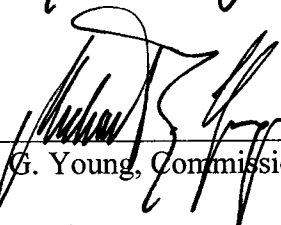
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission 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).

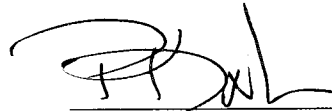
¹ Commissioner Althen was recused from this case. Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 6, 2013, and became a final order of the Commission on September 5, 2013. Barrick asserts that it explained to MSHA Field Officer Supervisor Gary Hebel that it intended to contest Citation Nos. 8701559, 8701765, and 8701772, but requested that the Proposed Assessment be placed "on hold" until after the inspection close-out conference. MSHA acknowledges that Hebel believed that the 30-day deadline to contest proposed penalties could be suspended for the duration of the inspection and that this mistaken belief may have contributed to the confusion resulting in Barrick's untimely contest on September 24, 2013. The Secretary does not oppose the request to reopen, but urges the operator and counsel to take steps to ensure that future penalty contests are timely filed.

Having reviewed Barrick's 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.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner


Patrick K. Nakamura, Commissioner

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