## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 1 2017

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

 $\mathbf{v}$ 

Docket No. CENT 2016-458-M
A.C. No. 23-02434-409715

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CONTINENTAL CEMENT COMPANY, LLC

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 July 8, 2016 the Commission received from Continental Cement Company, LLC ("Continental Cement") 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 May 14, 2016, and became a final order of the Commission on June 13, 2016.

Continental Cement asserts that its failure to timely file its contest to the proposed assessment was due to the unusually busy personal and work-related travel schedule of the mine's health and safety manager, who was charged with contesting the penalties at the mine. The operator states that upon receipt of the proposed assessment, it forwarded the assessment to the health and safety manager, who was on vacation. Upon returning from vacation, the health and safety manager's work schedule included two weeks of new miner safety training, an audit, and an MSHA inspection. Continental Cement discovered its default on its own and filed its motion 25 days after the order became final. The operator provides an affidavit from the health and safety manager that supports its claims.

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.

Having reviewed Continental Cement's request and the Secretary's response, we conclude that the operator's failure to timely contest the two citations herein was the result of inadvertence and mistake on the part of a single individual. 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

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