

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 11 2017

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

v.

NYRSTAR GORDONSVILLE, LLC

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Docket No. SE 2016-255-M
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A.C. No. 40-00864-408129
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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 June 17, 2016, the Commission received from Nyrstar Gordonsville, LLC (“Nyrstar”) 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 April 21, 2016, and became a

final order of the Commission on May 23, 2016. Nyrstar asserts that it intended to contest the citations but mistakenly paid them instead. Nyrstar's safety and health manager states that the operator had been on alert to watch for and contest the two citations at issue here because the citations arose out of an incident involving the injury to a contractor at the mine.¹ The two Nyrstar employees tasked with reviewing MSHA assessments nevertheless failed to note the two citations at issue here because the proposed penalties were lower than expected. The operator further asserts that the mine's safety supervisor, who was the first employee to review MSHA's assessments, was transitioning to a new position with the company in a different part of the state. At the same time, Nyrstar's safety and health manager, who provides the second review of assessments, was preoccupied with an occupational health and safety audit and therefore failed to fully review the citations.

Nyrstar avers that it has amended its system of handling MSHA penalty assessments to include a third level of review. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that it understands all future documents sent by MSHA.

¹ Nyrstar challenged the citations in a conference with MSHA, and MSHA subsequently amended parts of the two citations.

Having reviewed Nyrstar's request and the Secretary's response, we find that the failure to contest the two citations herein was an inadvertent mistake. 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.



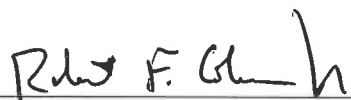
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Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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