

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 22, 2019

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2018-430-M
v.	:	A.C. No. 26-02572-457995
	:	
NEW GOLD NEVADA, INC.	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, 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 11, 2018, the Commission received from New Gold Nevada, Inc. (“New Gold”) 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on February 5, 2018, and became a final order of the Commission on March 7, 2018.

New Gold asserts that it failed to timely contest the Proposed Penalty Assessment because it was awaiting a response from MSHA in regards to a conference held on January 4, 2018. After receiving the citations, New Gold requested an informal conference call with a local MSHA representative in order to negotiate modifications to the citations before penalties were assessed. New Gold asserts that it emailed inquiries concerning its proposed modifications to MSHA on January 24, 2018, February 27, 2018, and March 8, 2018, but did not receive a response until March 9, 2018, after the Proposed Penalty Assessment had become a final order of the Commission.¹ New Gold acknowledges the receipt of the Proposed Penalty Assessment, but states that it purposely did not respond due to what it thought were ongoing negotiations with the Secretary.² 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 New Gold’s request and the Secretary’s response, we find that the operator’s failure to timely contest the assessment was the result of the operator’s inadvertence. 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.

¹ In its March 9, 2018 response, MSHA forwarded New Gold an email dated January 12, 2018, which contained MSHA’s original response to the January 4, 2018 conference call. New Gold maintains that it has no record of receiving the January 12, 2018 email. It is unclear why MSHA did not promptly respond to New Gold’s subsequent attempts to resolve the confusion.


² We note that, while parties are free to engage in pre-contest negotiations, such negotiations do not toll the deadline for an operator to contest proposed penalties. *See* 30 U.S.C. § 815(a).



Marco M. Rajkovich, Jr., Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

Distribution:

**Melodie Devlin-Joyal
Corporate Secretary
New Gold Nevada, Inc.
8023 Enterprise St.
Burnaby, BC V5A 1V5**

**Ali Beydoun, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450**

**Acting Chief Administrative Law Judge Margaret Miller
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**