FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N WASHINGTON, D.C. 20004-1710

JUN 2 2 2015

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

Docket No. SE 2014-195-M A.C. No. 40-00065-327746

v.

LIVINGSTON LIMESTONE COMPANY,

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

INC.

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 12, 2014, the Commission received from Livingston Limestone Company ("Livingston") 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

¹ Commissioner Cohen has elected not to participate in this matter.

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 July 24, 2013, and became a final order of the Commission on August 23, 2013. The operator paid the penalty in full by check dated August 12, 2013. On January 24, 2014, MSHA informed an agent of the operator of its proposal to assess an individual civil penalty against him under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Livingston contends that it would not have made the above payment if it had known that MSHA intended to pursue a 110(c) investigation followed by a finding of individual liability. Therefore, the operator seeks to reopen this matter, presumably to ensure that payment will not constitute an admission of wrongdoing on the part of the operator or its agents.

The Secretary opposes the request to reopen, noting that the operator's concerns are unfounded. The Secretary assures the operator that he will not argue that Livingston's payment estops its agent from litigating any aspect of the underlying violation.

Having reviewed Livingston's request and the Secretary's response, we conclude that the outcome of the matter before us will not prejudice any future section 110(c) proceeding.

Accordingly, we deny Livingston's motion with prejudice.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick Federal Mine Safety & Health Review Commission 1331 Pennsylvania Ave., N. W., Suite 520N Washington, D.C. 20004-1710