

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

JUL 07 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. CENT 2014-523-M
v.	:	A.C. No. 41-02885-337327 Z674
	:	
ALIMAK HEK ELEVATOR COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

**ORDER<sup>1</sup>**

BY: Young, Nakamura, and Althen, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 4, 2014, the Commission received from Alimak Hek Elevator Company (“Alimak”) 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).

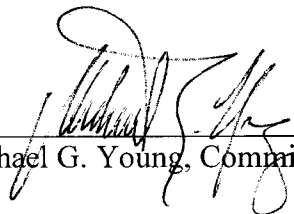
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission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

<sup>1</sup> Due to a clerical error, this Order is being amended pursuant to 29 C.F.R. § 2700.79.

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") demonstrate that the proposed assessment was delivered on December 14, 2013, and became a final order of the Commission on January 13, 2014. Alimak asserts that it changed its physical location in October and never received any documentation regarding the citation at issue until July 30, 2014. The Secretary does not oppose the request to reopen. However, he notes that the proposed assessment had been correctly mailed to Alimak's official address of record before being returned as "Undeliverable" with no forwarding address. After placing a phone call to the company to receive its new address, the Secretary re-mailed the proposed assessment by certified mail, which Alimak signed for on December 14, 2013. The Secretary offers a copy of a certified mail receipt to this effect and urges Alimak to ensure that its address of record remain current.

Having reviewed Alimak'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.



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Michael G. Young, Commissioner



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Patrick K. Nakamura, Commissioner



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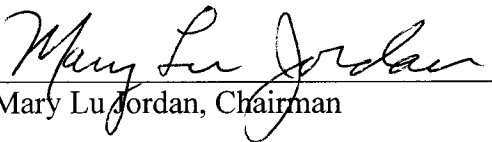
William I. Althen, Commissioner


Chairman Jordan and Commissioner Cohen, dissenting:

We would deny the motion to reopen filed by the Alimak Hek Elevator Company (“Alimak”). The only reason Alimak provides for failing to timely contest the \$100 penalty proposed by the Secretary is that it changed its physical location in October 2013 and never received any information about the citation until July 2014. However, the Secretary has submitted a certified mail receipt showing that the assessment was delivered to Alimak and signed for on December 14, 2013. The tracking information also shows that the assessment was delivered on that date to its destination in Dallas, Texas (where the Secretary states he sent it after consulting with Alimak).

Given that it appears that the proposed assessment was delivered to the operator on December 2013, it is irrelevant that the operator changed locations two months prior to that date. Moreover, its claim that it never received any information about the citation is controverted by the exhibits submitted by the Secretary.

Consequently, because the operator has not demonstrated that its failure to timely contest the penalty proposal was due to its excusable neglect, we would deny relief.

  
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Mary Lu Jordan, Chairman

  
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Robert F. Cohen Jr., Commissioner

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