

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 30, 2018

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket No. CENT 2017-444-M  
PETE LIEN & SONS INC. : A.C. No. 39-00020-435753

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 August 2, 2017, the Commission received from Pete Lien & Sons, Inc. (“Pete Lien”) 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 April 13, 2017, and became a

final order of the Commission on May 15, 2017. MSHA sent a delinquency notice to the operator on June 28, 2017 for the remaining unpaid amount of the assessment.

Pete Lien asserts that it intended to contest the penalties for three of the twelve citations, but that it mistakenly mailed its contest along with the payment of the uncontested penalties to MSHA's St. Louis Payment Processing Center.<sup>1</sup> The Secretary does not oppose the request to reopen, and confirms that MSHA internal records show that it processed a partial payment for this assessment on May 16, 2017, the day after the assessment became a final order. Pete Lien filed its motion to reopen on August 2, 2017, after receiving the delinquency notice.

Therefore, having reviewed Pete Lien's request and the Secretary's response, we find that Pete Lien's failure to timely contest the assessment was the result of a mistake regarding the proper address for filing a contest with MSHA.<sup>2</sup> In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to

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<sup>1</sup> Contests of proposed penalties should be sent to the MSHA Civil Penalty Compliance Office in Arlington, Virginia, as indicated on the Notice of Contest Rights and Instructions, included with the proposed assessment.

<sup>2</sup> However, we note that this is Pete Lien's third motion to reopen in two years where the operator sent their contest to the incorrect address. Therefore, we urge the operator to take steps to ensure that future penalty contests are timely filed to the MSHA Civil Penalty Compliance Office in Arlington, Virginia. *See* 39 FMSHRC 1781 (Sept. 2017); 39 FMSHRC 1001 (May 2017). If Pete Lien does not take steps to remedy the faults in its processing of penalty contests, future motions to reopen may be denied. *See, e.g. Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011) (an operator has not established grounds for reopening when the failure to contest a proposed assessment results from an inadequate or unreliable processing system).

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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