

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

August 30, 2018

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2017-176
v.	:	A.C. No. 44-06045-427215
	:	
BARNETTE CONTRACTORS, INC.	:	

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 7, 2017, the Commission received from Barnette Contractors, Inc. (“Barnette”) 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 December 27, 2016, and

became a final order of the Commission on January 26, 2017. Barnette asserts that on January 2, 2017, counsel for the operator sent a letter objecting to the proposed penalty assessment to the Executive Director of the Federal Mine Safety and Health Review Commission in Washington, D.C., with a copy to the MSHA District Office in Norton, Virginia.

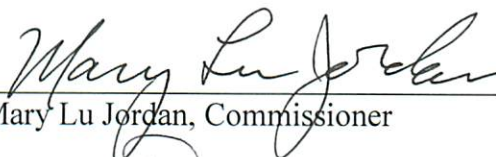
USPS records indicate that the operator's January 2, 2017 letter was received by the Federal Mine Safety and Health Review Commission in Washington, D.C. on January 9, several weeks before the assessment became a final order. *See* Attachment C to the Secretary's Non-Opposition (receipt indicating delivery date of letter). However, the proposed assessment instructs the operator to send any contest to the MSHA Civil Penalty Compliance Office in Arlington, Virginia. Therefore, while the operator mailed its contest before the assessment became a final order, it incorrectly sent its contest to the wrong agency (i.e., the Commission) and to an MSHA District Office rather than to the MSHA Civil Compliance Office in Arlington, Virginia.

We recognize that the operator timely mailed its contest, albeit to the wrong address. Furthermore, we recognize that 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.

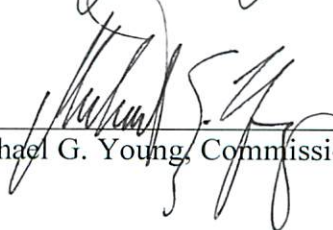
Therefore, having reviewed Barnette's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was a result of mistake, inadvertence, or excusable neglect under Rule 60(b). In the interest of justice, we hereby reopen this matter and remand it to the 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.



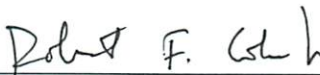
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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