

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

SEP 10 2015

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

v.

HARRY CROOKER & SONS,
INC.

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: Docket No. YORK 2014-81
: A.C. No. 17-00576-326378
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BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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 February 11, 2014, the Commission received from Harry Crooker and Sons, Inc. (“Harry Crooker”) 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).

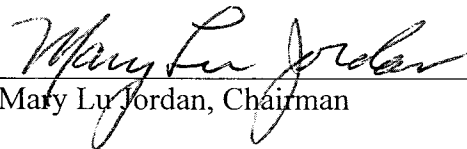
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

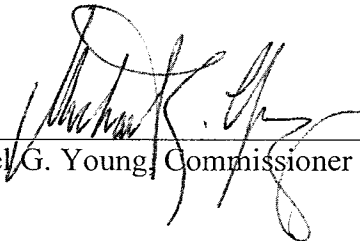
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission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

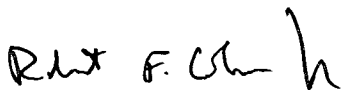
The record indicates that the proposed assessment was delivered at some point between July 9, 2013 and July 16, 2013.¹ As a result, the proposed assessment became a final order of the Commission at some point between August 8, 2013 and August 15, 2013. Crooker asserts that it had sent a timely contest to the proposed assessment to MSHA on July 16, 2013. The Secretary states that it does not have any record of receiving the contest form, but does not oppose reopening the penalty assessment. Crooker does not offer any proof of delivery via certified mail. The Secretary urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner.


Having reviewed Crooker'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.

¹ Neither party offers any information regarding the date that MSHA delivered the proposed assessment to Harry Crooker. The record does show, however, that MSHA issued its remittance coupon to Harry Crooker on July 9, 2013. Furthermore, the operator asserts that it mailed in the contest form on July 16, 2013, and offers a copy of the contest form with the signature of the safety director and the aforementioned date. Thus, we can reasonably infer that the proposed assessment was delivered to the operator at some point from July 9, 2013 to July 16, 2013.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner


Robert F. Cohen, Commissioner


Patrick K. Nakamura, Commissioner


William I. Althen, Commissioner

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