

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 14 2017

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2017-35-M
v.	:	A.C. No. 36-09286-414172
	:	
HANSON AGGREGATES BMC, 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 November 16, 2016, the Commission received from Hanson Aggregates BMC, Inc. (“Hanson Aggregates”) 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), 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 became a final order of the Commission on August 30, 2016. Hanson Aggregates asserts that the mine where this citation was issued was shut down for business reasons on June 24, 2016 and the workers were laid off. During the shutdown, Hanson Aggregates claims it was unable to investigate the citations or interview the workforce. As a result, management could not make an informed decision as to whether the citations should be contested.

Documents provided by Hanson Aggregates confirm that the operation was reopened on September 2, 2016. Hanson Aggregates also alleges that it filed a Freedom of Information Act request for the inspector’s notes, photographs, and other information, but received no response. The Secretary does not oppose the request to reopen.

Having reviewed Hanson Aggregates request and the Secretary’s response, we determine that the operator failed to contest this assessment because the operation was shut down when the assessment was issued. As a result the operator failed to collect relevant information to make a determination on which citations to contest. The operator’s actions are best characterized as excusable neglect. Therefore, 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.



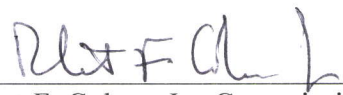
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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