

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

SEP 29 2017

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

v.

JOSE RODRIGUEZ

:
:
:
: Docket No. PENN 2016-219-M
: A.C. No. 36-08913-403846 A9812
:
:

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 May 13, 2016, the Commission received from Jose Rodriguez (“Rodriguez”) 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).¹

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

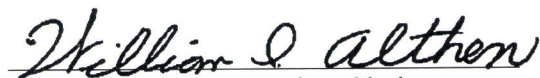
¹ “Jose Rodriguez” is apparently the name of a company offering contracting services (employing on average 2-3 employees from 2015-2017 according to the Mine Date Retrieval System) as well as the individual responsible for compliance for that contractor.

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 March 27, 2016, and became a final order of the Commission on April 26, 2016.² Rodriguez asserts in an affidavit (written in Spanish and translated into English) dated May 12, 2016, that he is unable to read English and therefore did not understand the meaning of the documents or the procedural requirements he needed to fulfill to contest the citation. He repeatedly attempted to call MSHA, but was unable to reach anyone who could help him. Rodriguez further states that he will have future MSHA issuances translated so that he can understand them. Significantly, documents filed by the parties show that Rodriguez filed his request to reopen just 17 days after the assessment became final and Rodriguez has not filed any other motions to reopen with the Commission in the last two years. 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.

² The Secretary’s Response states that the proposed assessment was delivered on March 27, 2016, via USPS certified mail. However, no receipts were included in the Secretary’s filing confirming the delivery date. The alleged delivery date is a Sunday. Regardless, Rodriguez concedes, in his request to reopen, that he did not file an Answer to the proposed assessment until after became final on or about April 26, 2016.

Having reviewed Rodriguez's request and the Secretary's response, we find that he inadvertently failed to contest the instant matter because he was unable to read English, and then was unable to reach MSHA to attain assistance. He has agreed to take actions necessary to prevent this issue from reoccurring. 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.



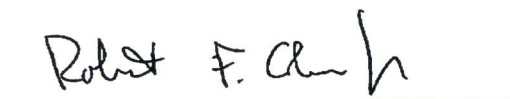
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution:

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place
Suite D
Beltsville, MD 20705

Ali Beydoun, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave. N.W., Suite 520N
Washington, DC 20004-1710

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450