

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

May 16, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2013-882-M
ADMINISTRATION (MSHA)	:	A.C. No. 35-00541-321284
	:	
v.	:	Docket No. WEST 2014-525-M
	:	A.C. No. 35-00541-332405
CRATER SAND & GRAVEL, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 1, 2014, the Commission received from Crater Sand & Gravel, Inc. (“Crater”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it, and 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).<sup>1</sup>

In Docket No. WEST 2013-882-M, Chief Administrative Law Judge Robert J. Lesnick issued on September 16, 2013, an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Crater’s perceived failure to answer the Secretary’s July 12, 2013 Petition for Assessment of Civil Penalty. The Commission did not receive Crater’s answer within 30 days, so the default order became effective on October 17, 2013.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2013-882-M and WEST 2014-525-M, both captioned *Crater Sand & Gravel, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In Docket No. WEST 2014-525-M, records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 24, 2013, and became a final order of the Commission on October 24, 2013. MSHA mailed a delinquency notice on December 9, 2013.

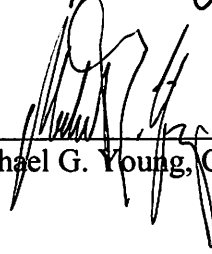
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

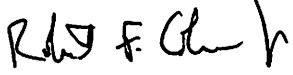
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission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


Crater asserts that it mailed a timely answer to the petition to MSHA, and encloses a copy of a USPS receipt dated July 26, 2013. Crater further states that it contested all four underlying citations issued during this inspection and has been responding to discovery requests from MSHA. Crater also asserts that its bookkeeper was out of the office in October 2013, which contributed to Crater's confusion. The Secretary of Labor does not oppose the requests to reopen and states that MSHA received a timely but misdated answer to the petition in Docket No. WEST 2013-882-M, which was forwarded to the Commission on August 27, 2013. The Secretary further states that MSHA received a letter from the operator dated January 26, 2014, enclosing a copy of a checked proposed penalty contest form in Docket No. WEST 2014-525-M. The Secretary notes that it appears that the operator thought that all proposed assessments and citations had been contested.

Having reviewed Crater's request and the Secretary's response, in the interest of justice, we hereby reopen these matters and vacate the Default Order in Docket No. WEST 2013-882-M. Accordingly, in Docket No. WEST 2014-525-M, 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. Because Administrative Law Judge Richard Manning has the companion case, Docket No. WEST 2013-881-M, we are remanding these matters to him for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
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Mary Lu Jordan, Chairman

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

  
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Patrick K. Nakamura, Commissioner

  
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William I. Althen, Commissioner

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