

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

April 27, 2010

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

v.

THE OLEN CORPORATION

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Docket No. LAKE 2010-322-M
A.C. No. 33-04147-198682

BEFORE: Jordan, Chairman; Duffy, 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. (2006) (“Mine Act”). On January 11, 2010, the Commission received from the Olen Corporation (“Olen”) a request 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198682 to Olen on September 29, 2009, proposing penalties for six citations that had been issued to Olen in August 2009, including Citation Nos. 6403708, 6403709, and 6403712. Olen states that it had requested a conference with the local MSHA office regarding Citation Nos. 6403709 and 6403712, and sent the proposed assessment form designating the two citations as contested along with payment for other citations to MSHA. Olen further states that MSHA's Civil Penalty Compliance Office does not have a copy of its request, and that Olen received a notice from MSHA stating that it was delinquent in paying penalties associated with Citations Nos. 6403708 and 6403709. Olen clarifies that it did not want a conference on Citation No. 6403708.

The Secretary of Labor does not oppose reopening but notes that the records of MSHA's Civil Penalty Compliance Office do not indicate that it received a contest of Proposed Assessment No. 000198682.

Having reviewed Olen's request and the Secretary's response, in the interests 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 2700.¹ Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty with respect to Citation Nos. 6403709 and 6403712 within 45 days of the date of this order.² *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ Despite its outstanding conference request on the citations, Olen was obligated to file a formal contest of the associated penalties in the assessment within 30 days of receiving the assessment with MSHA's Arlington, Virginia, office and to pay any penalties to MSHA's St. Louis, Missouri, office. *See* 29 C.F.R. § 2700.26. Olen should take appropriate steps to ensure that it complies with these requirements in the future.

² MSHA should reapply Olen's payment to the penalty associated with Citation No. 6403708 as appropriate.

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