FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 8, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-114
	:	A.C. No. 33-04565-217111
	:	
v.	:	Docket No. LAKE 2011-115
	:	A.C. No. 33-04565-219905
MOUNTAIN SPRING COAL COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 November 9, 2010, the Commission received from Mountain Spring Coal Company ("Mountain Spring") 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). On December 14, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

Mountain Spring maintains that it did not receive the proposed penalty assessments until after the time to contest had passed. On March 31, 2010, Mountain Spring sent written notification to the MSHA District Four office that the new operator for the 10-7 Mine in Bergholz, Ohio, would be Rosebud Mining Company effective April 1, 2010, and that any correspondence, "including assessments," should be forwarded to Mountain Spring's Danville, West Virginia address. The operator also filed a change of address with the U.S. Postal Service. On April 15 and May 13, 2010, MSHA issued Proposed Assessment Nos. 000217111 and 000219905, respectively, to Mountain Spring. The assessments were sent via Federal Express to the operator's previous Bergholz address where they were signed for by persons at the mine. After checking MSHA's data retrieval system and discovering that one assessment had become a final order and the other was delinquent, the operator contacted MSHA and eventually obtained email copies of the assessments on August 3, 2010. The operator sent in its contest the same day, and again notified MSHA of its correct address. Seven days later, Mountain Spring sent payment for the remaining uncontested citations. The operator subsequently received a delinquency letter for each assessment and a letter dated August 13, 2010, denying its contest as untimely. MSHA sent the letters to the operator's former Bergholz address. The Secretary does not oppose Mountain Spring's motion, and confirms that the Legal ID Report for the mine, reflects the current operator as Rosebud Mining as of April 1, 2010.

The proposed assessments were Federal Expressed to an address no longer utilized by Mountain Spring. On March 31, 2010, 15 days prior to issuance of Assessment No. 000217111 and a month and half prior to issuance of Assessment No. 000219905, the operator notified MSHA of its new address as required by 30 C.F.R. § 41.12. After several email exchanges with MSHA, Mountain Spring received copies of the assessments on August 3, 2010, and returned its contests of the assessments to MSHA the same day. Based on the foregoing, we conclude that Mountain Spring did not "receive" the penalty assessments within the meaning of section 105(a) of the Mine Act until August 3, 2010. Because Mountain Spring filed its notice of contest on the same day, well within the 30-day statutory period, we conclude that it timely notified the Secretary of its intent to contest the proposed penalty assessments. *See The Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994); *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998).

Accordingly, the proposed penalty assessments are not final orders of the Commission, and these cases are remanded to the Chief Administrative Law Judge for assignment. The matters shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. 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.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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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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