

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 28, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2009-802-M
ADMINISTRATION (MSHA)	:	A.C. No. 09-00472-183080 PEU
	:	
v.	:	Docket No. SE 2009-803-M
	:	A.C. No. 09-00959-183082 PEU
B & H TRANSFER COMPANY	:	

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 August 10, 2009, the Commission received from B & H Transfer Company (“B & H”) a letter seeking to reopen penalty assessments that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2009-802-M and SE 2009-803-M, both captioned *B & H Transfer Co.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

With respect to Proposed Assessment No. 000183080 PEU, both the operator and the Secretary now agree that the proposed assessment was timely contested. The Secretary asserts that MSHA misfiled the contest form and, as a result, the case was not processed properly. The Secretary submits that the error has been corrected and the contest is being considered timely and will follow the normal course of proceeding. As to Proposed Assessment No. 000183082 PEU, the Secretary states that the penalty contained therein was assessed against B & H in error and will be removed from its account.

Having reviewed B & H’s requests and the Secretary’s response, we find the requests to reopen to be moot. B & H has properly contested Proposed Assessment No. 000183080 PEU, and therefore it did not become a final order of the Commission. This case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. With respect to Proposed Assessment No. 000183082 PEU, we also find the request to reopen to be moot because the penalty contained therein was assessed in error and has been or will be removed from the operator’s account.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Tommy Cauthen
Dir. Of Safety
B& H Transfer Co.
750 Sparta Rd.
Sandersville, GA 31082

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021