

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 1, 2011

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

v.

SIKES PIPE COMPANY

:
:
:
:
:
:
:
:
:
:

Docket No. SE 2010-1161-M
A.C. No. 08-01060-222560

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 September 8, 2010, the Commission received from Sikes Pipe Company (“Sikes”) a letter requesting that the Commission 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. 000222560 to Sikes on June 15, 2010. Sikes states that it never received the proposed assessment form. In August 2010, the operator's records keeper discovered that the proposed penalties set forth on the form were considered final Commission orders when she reviewed MSHA's data retrieval system regarding unrelated citations. Upon investigation, the operator discovered that the form had been sent by FedEx but returned as unclaimed. Sikes' records keeper states that until recently, she had been traveling out of town for a week-and-a-half every month, and that it was possible that delivery had been attempted during her absence.

The Secretary does not oppose Sikes' request to reopen. However, she states that if the person responsible for processing mail is going to be away for a length of time each month, the operator should make arrangements to ensure that proposed assessments are received and processed in a timely manner during that person's absence.

Having reviewed the facts and circumstances of this case, Sikes' request, and the Secretary's response, 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.

Within 30 days of the date of this order, Sikes must notify the Secretary as to which citations it wishes to contest on Proposed Assessment No. 000222560. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of notification by the operator. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Distribution:

Ashley Sikes
Records Keeper/Accountant
Sikes Pipe Co.
206 Hollis Ave.
Panama City, FL 32401

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
U.S. Dept. of Labor, MSHA
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