

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 2009

SECRETARY OF LABOR,	:	Docket No. VA 2009-46
MINE SAFETY AND HEALTH	:	A.C. No. 44-03088-151516 GTY
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2009-47
	:	A.C. No. 44-07087-144483 GTY
	:	
	:	Docket No. VA 2009-48
v.	:	A.C. No. 44-07069-148351 GTY
	:	
	:	Docket No. VA 2009-49
	:	A.C. No. 44-07069-144482 GTY
BRESEE TRUCKING CO., INC.	:	
	:	Docket No. KENT 2009-190
	:	A.C. No. 15-17165-136968 GTY

BEFORE: Duffy, Chairman; Jordan, 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 November 5, 2008, the Commission received from Bresee Trucking Co., Inc. (“Bresee”) motions by counsel seeking to reopen five penalty assessments that had 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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2009-46, VA 2009-47, VA 2009-48, VA 2009-49, and KENT 2009-190, all captioned *Bresee Trucking Co., Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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 inadvertence or mistake. *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 record indicates that delivery of the proposed penalty assessments was attempted at several addresses but was not successful. Upon learning that the proposed assessments were delinquent, the operator filed these requests to reopen. The Secretary states that she does not oppose the reopening of the proposed penalty assessments but urges the operator to make sure that it keeps MSHA informed of its current address of record.

It is an operator’s responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Bresee’s official address of record at the time of assessment and whether Bresee maintained its correct address with MSHA. If MSHA sent the proposed assessment to Bresee’s official address of record, grounds may exist for denying Bresee’s request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Bresee’s request may be moot.

Having reviewed Bresee's motions, we remand this matter to the Chief Administrative Law Judge for a determination of whether the proposed assessments became final orders and, if so, whether the final orders should be reopened. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Bresee's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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