

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 11, 2009

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

v.

BRAHMA GROUP, INC.

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Docket No. WEST 2009-109-M
A.C. No. 04-00011-136931 H409

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 3, 2008, the Commission received from Brahma Group, Inc. (“Brahma”) a letter seeking 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).

On October 3, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued two citations to Brahma. Thereafter, on October 17, Brahma filed a notice of contest of the citations. According to Brahma’s director of risk management, since the time Brahma filed the contest, it heard nothing further until it recently was informed that collections efforts had been commenced to collect penalties arising out of the citations. Brahma’s director further states that Brahma had been unaware of the proposed penalty assessment and collection efforts because notices were repeatedly sent to the wrong address.

In response, the Secretary states that she does not oppose Brahma’s request for relief. However, the Secretary notes that the proposed assessment and delinquency notice were mailed to the address of record. The Secretary attached to her response a copy of the Contractor

Information Report containing Brahma's name and address. The Secretary added that Brahma should take necessary steps to ensure that the address of record is accurate.

We have held 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).

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 Brahma's official address of record at the time of assessment and whether Brahma maintained its correct address with MSHA. If MSHA sent the proposed assessment to Brahma's official address of record, grounds may exist for denying Brahma's request for relief. *Mass Transport, Inc.*, 30 FMSHRC 997, 999 (Nov. 2008). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Brahma's request may be moot.

Having reviewed Brahma's request and the Secretary's response, we remand this matter to the Chief Administrative Law Judge for a determination of whether Brahma's request should be granted. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Brahma'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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