

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 30, 2010

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

v.

ELCON CONSTRUCTION, INC.

:  
:  
:  
:  
:  
:  
:  
:  
:

Docket No. WEST 2009-1204-M  
A.C. No. 10-00088-166728 L991

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 August 6, 2009, the Commission received from Elcon Construction, Inc. (“Elcon”) 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).

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).

On October 23, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed assessment at issue. Elcon claims that it timely mailed the contest form on November 20, 2008, and did not receive any further correspondence relating to the assessment until it received a collection notice from the Department of Treasury dated May 16, 2009. The Secretary asserts that she has no record of receiving the contest and notes that a delinquency notice was sent to the operator on January 15, 2009, before the case was referred to the Treasury Department for collection. She does not oppose reopening but urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner and mailed to the appropriate MSHA address.

Having reviewed Elcon's request and the Secretary's response, in the interests of justice, 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. Accordingly, 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.

---

Mary Lu Jordan, Chairman

---

Michael F. Duffy, Commissioner

---

Michael G. Young, Commissioner

---

Robert F. Cohen, Jr., Commissioner

---

Patrick K. Nakamura, Commissioner

Distribution:

Mark Lehinger  
Elcon Construction Inc.  
P.O. Box, 13037  
Spokane, WA 99213-3037

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

Myra James, Chief  
Office of Civil Penalty Compliance, MSHA  
U.S. Dept. of Labor  
1100 Wilson Blvd., 25<sup>th</sup> 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