

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 30, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-1216
v.	:	A.C. No. 01-00082-187443 ¹
	:	
U.S. SILVER-IDAHO, INC.	:	

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 7, 2009, the Commission received from U.S. Silver-Idaho, Inc. (“U.S. Silver”) a motion 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

¹ The Assessment Case Number has been corrected to accurately reflect the Proposed Penalty Assessment at issue.

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).

U.S. Silver states that it sent its contest form to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) approximately one week after the 30-day deadline. The affidavit of U.S. Silver’s safety superintendent indicates that, although the company has an established procedure for processing proposed assessments, he neglected to send the contest form to a company administrative assistant for mailing to MSHA until the deadline had passed. The affidavit also notes that the company has now revised its procedure to more accurately calendar assessments in an effort to avoid the same circumstance in the future.² When MSHA informed it of the mistake, U.S. Silver promptly filed a motion to reopen. Contests had already been filed for two of the citations at issue.

The Secretary does not oppose the reopening of the proposed penalties.

² The revised procedure places deadlines to contest all MSHA assessments, detailed by mine name and case number, on both the paper and electronic calendars of both the safety superintendent and the administrative assistant.

Having reviewed U.S. Silver'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

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