

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 1, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-533-M
v.	:	A.C. No. 50-01571-159284
	:	
LAPP & SONS	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

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 February 20, 2009, the Commission received a request to reopen a penalty assessment issued to Lapp & Sons (“Lapp”) that may have 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 August 5, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000159284 to Lapp, proposing penalties for two citations and an order that had been issued to Lapp. After receiving no response, MSHA sent Lapp a delinquency notification on or around November 4, 2008, for the assessment. Lapp states that it had faxed a letter contesting the citations and order to the MSHA inspector shortly after receiving them in accordance with his instructions, but never heard anything further until it received the delinquency notice on December 11, 2008.

---

<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

The Secretary states that she does not oppose the reopening of the assessment, but notes that the proposed assessment and delinquency notice were mailed to the operator's address of record.

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).

Lapp includes with its request to reopen a copy of its Legal Identity Report dated June 18, 2008, that shows a different address from the August 5, 2008, Proposed Assessment issued by MSHA. From the record, it thus appears that MSHA did not update Lapp's address of record, which would explain why Lapp did not receive the assessment. There is thus no final order in this case to reopen. Accordingly, we deny Lapp's request to reopen as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006). Because Lapp's request indicates it wishes to contest both citations and the order, its request can serve as the operator's notice of contest of all three penalties. Consequently, and 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.

---

Michael F. Duffy, Chairman

---

Mary Lu Jordan, Commissioner

---

Michael G. Young, Commissioner

Distribution:

Clayton Lapp, Co-Owner  
Lapp & Sons  
P.O. Box 30076  
Central, AK 99730

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