

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 13, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-516-M
v.	:	A.C. No. 26-02300-197930
	:	
J.S. REDPATH CORPORATION	:	

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 January 14, 2010, the Commission received a request from J.S. Redpath Corporation (“Redpath”) 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000197930 to Redpath on September 22, 2009, proposing civil penalties for nine citations that had been issued to Redpath in August 2009. Redpath contested the penalties but sent the penalty contest and a conference request to the MSHA district office rather than to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The operator explains that it made a similar error in Docket No. WEST 2010-93-M, but that it was not informed of its error until it had already made the same mistake in the subject proceeding. The operator discovered that it had made the same mistake as it had in Docket No. WEST 2010-93-M after it received a delinquency notice from MSHA, and promptly submitted its request to reopen.

The Secretary of Labor opposes reopening in this instance on the basis that the operator has made no showing of circumstances that warrant reopening. She points out that both the proposed assessment form and the letter Redpath received from the regional MSHA district office, acknowledging a conference request, specified that any contest of a proposed penalty is to be sent to MSHA's Arlington office.

Having reviewed Redpath'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. *See J.S. Redpath Corp.*, 32 FMSHRC 15, 17 (Jan. 2010). Redpath sent its contest to the regional MSHA district office within the 30-day period for contests, fully explained and documented its error, and promptly filed its request for relief upon discovering the error. 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 N. Savit, Esq., Patton Boggs LLP
1801 California Street, Suite 4900
Denver, CO 80202

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., 25th 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