

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 31, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-637-M
v.	:	A.C. No. 26-02246-198651
	:	
BARRICK GOLDSTRIKE MINES, INC.	:	

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 February 5, 2010, the Commission received from Barrick Goldstrike Mines, Inc. (“Barrick”) a motion by counsel 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).

However, 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).

On September 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198651 for 19 citations and an order issued to Barrick in August 2009. In its original motion, Barrick stated that a member of its staff attempted to fax the assessment to Barrick's counsel, and thought she had done so, but failed to notice the "undelivered" notation on the confirmation sheet. The operator further states that it learned that it was delinquent with respect to the assessment when it checked the MSHA web site, and its counsel soon thereafter filed its request to reopen.

The Secretary of Labor filed a response in opposition to Barrick's initial request. The Secretary states that the operator made no showing of circumstances that warrant reopening, and points to a relatively recent instance in which fax communication problems between Barrick and its counsel resulted in an assessment becoming a final order. *See Barrick Goldstrike Mines, Inc.*, 31 FMSHRC 1013 (Sept. 2009).

In reply to the Secretary's response in opposition, Barrick filed a modified request to reopen, by which it is only requesting reopening of the assessment as to Citation No. 6477873, Order No. 6477875, and the penalties associated with that citation and that order. The citation and order are each the subject of a pending notice of contest. The Secretary did not respond to Barrick's modified request to reopen.

Having reviewed Barrick's request, the Secretary's response, and Barrick's modified request, in the interests of justice, we hereby grant Barrick's modified request, reopen the penalty assessments in Citation No. 6477873 and Order No. 6477875, and remand the case 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

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