

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 30, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2010-696-M
ADMINISTRATION (MSHA)	:	A.C. No. 26-02286-205417
	:	
v.	:	Docket No. WEST 2010-697-M
	:	A.C. No. 26-02286-196384
BARRICK TURQUOISE RIDGE, 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 23, 2010, the Commission received from Barrick Turquoise Ridge, Inc. (“BTR”) motions made by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-696-M and WEST 2010-697-M, both captioned *Barrick Turquoise Ridge, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

According to the motions, BTR’s failures to file notice of contests with respect to the assessments were attributable to miscommunications between counsel and BTR in both instances. Proposed Assessment No. 000196384 was issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in September 2009. At that time, BTR’s then safety director was out of the office for weeks due to emergency surgery, so a member of his staff requested that counsel look at the 37 citations covered by the assessment. Only later did counsel learn that he was also supposed to file the notice of contest for the assessment. Counsel states that he learned of the delinquency regarding the assessment from the MSHA web site on February 22, 2010, and that BTR never received a delinquency notice from MSHA.

By December 2009 the Safety Director had returned. When Assessment No. 000205417 was issued by MSHA, he and counsel spoke regarding BTR’s intention to contest the penalties associated with two of the 23 citations included in the assessment. Counsel was left with the impression the BTR would file the notice of contest, but it was never filed. Counsel also learned of this delinquency from the MSHA web site.

The Secretary of Labor states that she does not oppose the reopening of either of the proposed penalty assessments.

Having reviewed BTR's requests 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

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