

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

January 12, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-93-M
v.	:	A.C. No. 26-02300-188847 R83
	:	
J.S. REDPATH CORPORATION	:	

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 October 20, 2009, 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. 000188847 to Redpath on June 23, 2009, proposing a penalty for a citation that had been issued to Redpath on May 12, 2009. By letter dated May 27, 2009, Redpath had already requested a conference on the citation with the local MSHA district office. Redpath subsequently contested the penalty for that citation by mailing the form to the same office, with a cover letter dated July 1, 2009. Because the contest form should have been mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia, Redpath received a delinquency notice dated September 17, 2009, from MSHA.

The Secretary of Labor opposes reopening in this instance. She points out that both the proposed assessment form and the letter Redpath received from the local MSHA office, dated June 16, 2009, acknowledging the conference request, specified that any contest of a proposed penalty is to be sent to MSHA's Arlington office. The Secretary also states that Redpath previously had properly contested penalties.

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. While what the Secretary states is correct, there is nothing in the record to indicate that Redpath's previous contests involved citations or orders on which it had already requested a conference. Redpath did send its contest to the local MSHA district office within the 30-day period for contests. 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. § 2700.28.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ We caution Redpath that it must send any future notice of contest regarding proposed penalties to the address specified on the proposed assessment form, regardless of whether it has an outstanding conference request on any underlying citation or order.

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