

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

February 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2010-986-M
	:	A.C. No. 35-03260-205195
HARVEY W. BUCHE ROAD	:	
BUILDING, 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 April 9, 2010, the Commission received a letter on behalf of Harvey W. Buche Road Building, Inc. (“Buche”) 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).

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).

On December 8, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000205195 to Buche. In its letter, Buche asserts that because of a miscommunication between the operator and the consultant as to who was to contest the penalty assessment, it was never contested.

The Secretary opposed reopening, asserting that an unreliable internal processing system is not grounds for reopening. She further asserted that the operator failed to adequately detail and justify the circumstances that warrant reopening.

Attorneys for Buche then submitted supplemental authority and affidavits in support of the request to reopen. In those affidavits, the President of Buche explains that he spoke with Mr. Redding, Buche's consultant, shortly after the assessment was received and understood that Mr. Redding would file the contest form with MSHA. Mr. Redding, however, stated that, in that conversation, he understood that the President of Buche was to check off the violations to contest them and to send the form to MSHA. The President of Buche avers that he first learned that the contest had not been submitted when he received the delinquency notice in early March 2010. Buche then promptly took steps seeking to reopen the penalty assessment.

Having reviewed Buche's request, the Secretary's response, and Buche's supplemental filing,¹ 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

¹ The Commission encourages parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *Highland Mining Co.*, 31 FMSHRC 1313, 1316 n.3 (Nov. 2009)

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