

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 3, 2010

SECRETARY OF LABOR,	:	Docket No. WEVA 2010-648
MINE SAFETY AND HEALTH	:	A.C. No. 46-08636-206152
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-649
	:	A.C. No. 46-08778-206154
v.	:	
	:	Docket No. WEVA 2010-650
ROCKHOUSE CREEK	:	A.C. No. 46-09018-206158
DEVELOPMENT, LLC	:	
	:	Docket No. WEVA 2010-651
	:	A.C. No. 46-09279-206161

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 22, 2010, the Commission received from Rockhouse Creek Development, LLC (“Rockhouse”) four motions made by counsel to reopen 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).<sup>1</sup>

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).

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-648, WEVA 2010-649, WEVA 2010-650, and WEVA 2010-651, all captioned *Rockhouse Creek Development, LLC*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

According to the record, this matter is before the Commission only because the four contest forms were mailed by Rockhouse on January 22, 2010, to the Department of Labor’s Mine Safety and Health Administration (“MSHA”), when the 30th day was January 21, 2010. Rockhouse’s counsel states that he only received the assessments from his client on January 20, 2010, and was out of the office until two days later.<sup>2</sup>

The Secretary of Labor does not oppose reopening.

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<sup>2</sup> In a footnote in its motion, Rockhouse states that because MSHA mailed the assessment, Commission Procedural Rule 8(b), 29 C.F.R. § 2700.8(b), should apply and the operator should have been accorded an additional five days in which to file the notices of contest. Rockhouse is mistaken regarding the applicability of Rule 8(b) to penalty assessments. *See The Banner Co.*, 31 FMSHRC 1046, 1047 n.1 (Sept. 2009).

Having reviewed Rockhouse'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.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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