

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 13, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2010-788
ADMINISTRATION (MSHA)	:	A.C. No. 46-09217-204747
	:	
v.	:	Docket No. WEVA 2010-810
	:	A.C. No. 46-09280-204750
INR-WV OPERATING, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On March 23 and 26, 2010, the Commission received motions by INR-WV Operating, LLC (“INR-WV”) 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).

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-788 and WEVA 2010-810, both captioned *INR-WV Operating, LLC*, and involving the same procedural issues. 29 C.F.R. § 2700.12.

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 2, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000204747 and 000204750 to INR-WV. The operator states that it failed to timely contest the proposed assessments due to a mistake by its accounting department. INR-WV contends that it followed normal procedures for processing the assessment forms in that the safety director received and reviewed the assessment forms, determined which penalties to contest and which to pay, and forwarded the forms to the accounts manager to prepare check requests and forward the requests and assessment forms to the accounting department for payment and processing. The operator contends that the failure occurred when the accounting department prepared the checks for payment, but did not submit the forms to MSHA's Arlington office or return them to the safety director so that he could submit them. The operator also states that it timely contested one of the underlying citations, pending in Docket No. WEVA 2010-260-R, which is the subject of the proposed assessment it seeks to reopen in Docket No. WEVA 2010-788. The operator filed its requests to reopen less than a month after receiving MSHA's delinquency notices in both cases.

On April 6, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments. She confirms that the operator timely submitted payment for the uncontested portions of both proposed assessments.

Having reviewed the facts and circumstances of these cases, the operator's requests, and the Secretary's responses, we hereby reopen these matters and remand them 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 petitions 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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