

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 27, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-159-M
v.	:	A.C. No. 30-02268-196081
	:	
BARTON MINES COMPANY, LLC	:	

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 February 3, 2010, the Commission received from Barton Mines Company, LLC (“Barton”) a request 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).

Barton states that shortly after receiving eight citations in July 2009 from the Department of Labor's Mine Safety and Health Administration ("MSHA"), it sent a letter requesting a conference on the citations to the local MSHA office, as it had been instructed at the time it received the citations. Barton further explains that later that month, in connection with an MSHA inspection of a separate facility, it received different instructions regarding how to request a conference on the citations. On September 8, 2009, MSHA issued Proposed Assessment No. 000196081 to Barton regarding the original set of eight citations. On September 17, 2010, Barton submitted a letter expressly contesting all of the citations and penalties to the MSHA district office from which it had requested a conference, with the marked-up assessment attached. Barton now acknowledges in its letter to the Commission that it sent the assessment form to the wrong address. It also asks that its previous request for a conference be reconsidered.

The Secretary of Labor opposes reopening the assessment on the ground that the operator is not requesting reopening, but rather is seeking a conference on the citations, a matter over which the Commission does not have jurisdiction.

Having reviewed Barton'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. We note that Barton did send a letter expressly contesting the proposed assessments to the local MSHA district office within the 30-day period for contests, and there is no indication that Barton has previously sent contests to the wrong address in circumstances such as these.¹ While the Commission cannot grant Barton's request for a conference, it can reopen the proceeding so that Barton is not foreclosed from contesting the citations and penalties, as it has indicated a number of times that it wished to do. 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

¹ We caution Barton that it must send any future notices of contest regarding proposed penalties to the address for the Civil Penalty Compliance Office in Arlington, Virginia, specified on the proposed assessment form.

Distribution:

Michelle Scheid,, Safety Mngr.
Barton Mines Co., LLC,
13TH Lake Rd.,
North Creek, NY 12853

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021