

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-123-M
	:	A.C. No. 14-00162-122958 A
	:	
v.	:	
	:	
THOMAS TORRANCE, employed by	:	
BUZZI UNICEM, USA	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) (“Mine Act”). On December 4, 2007, the Commission received from Thomas Torrance (“Torrance”) a motion by counsel seeking to reopen a penalty assessment against Torrance under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

On July 23, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Torrance, alleging that he was personally liable under section 110(c) of the Mine Act for an order issued to his employer, Buzzi Unicem, USA. In his motion and accompanying affidavit, Torrance asserts that he mailed the form contesting the penalty on August 18, 2007. Nevertheless, Torrance received a delinquency notice from MSHA in early November 2007, and according to Torrance, MSHA states that it never received the notice of contest form. Torrance maintains that the assessment never became a final order, but that if it is deemed to have become one, the proceeding should be reopened so that

Torrance can contest the penalty and underlying citation. The Secretary does not oppose reopening.

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 inadvertence or mistake. *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).

Having reviewed Torrance’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Torrance failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. If Torrance timely contested the penalty, or if it is determined that he did not but that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Distribution:

Gregory C. Ruffennach, Esq.  
1629 K Street, N.W.  
Suite 300  
Washington, D.C. 20036

Myra James, Chief  
Office of Civil Penalty Compliance, MSHA  
U.S. Department of Labor  
1100 Wilson Blvd., Room 25<sup>th</sup> Floor  
Arlington, VA 22209-3939

W. Christian Schuman, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd.  
22<sup>nd</sup> Floor West, Room 2220  
Arlington, VA 22209-2296

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