

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 24, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2008-1346
ADMINISTRATION (MSHA)	:	A.C. No. 15-18594-150594
	:	
v.	:	Docket No. KENT 2008-1347
	:	A.C. No. 15-18594-147288
EMBER CONTRACTING	:	
CORPORATION	:	Docket No. KENT 2008-1348
	:	A.C. No. 15-18594-139998

BEFORE: Duffy, Chairman; Jordan, 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. (2000) (“Mine Act”).¹ On July 25, 2008, the Commission received from Ember Contracting Corporation (“Ember”) a letter from its president in which he requests to reopen three 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).

In February, April, and May 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued three proposed assessments with penalties totaling \$157,861. According to Ember’s president, Ember did not receive the proposed assessments and first

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. KENT 2008-1346, KENT 2008-1347, and KENT 2008-1348, all captioned *Ember Contracting Corp.* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

learned of these penalties on July 16, 2008, when they appeared as “outstanding” on a proposed assessment that Ember received.

In response, the Secretary states that the proposed assessments at issue were sent to the address of record but were returned because they could not be delivered at that address. The Secretary further states that she does not oppose Ember’s request to reopen in this proceeding.²

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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).

It is an operator’s responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Ember’s official address of record at the time of assessment and whether Ember maintained its correct address with MSHA. If MSHA sent the proposed assessment to Ember’s official address of record, grounds may exist for denying Ember’s request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Ember’s request may be moot.

² The Secretary urges Ember to take all steps necessary to ensure that future penalty assessments are “received, processed and contested in a timely manner.” The Secretary states that she may oppose future motions to reopen penalty assessments if they are not timely contested.

Having reviewed Ember's request and the Secretary's response, we remand this matter to the Chief Administrative Law Judge for a determination of whether Ember timely contested the penalty proposal. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Ember's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Randy Gilkerson, President
Ember Contracting Corp.
P.O. Box 1500
Pikeville, KY 41502

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. Department 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