

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 22, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2008-1083
ADMINISTRATION (MSHA)	:	A.C. No. 46-07366-135717
	:	
v.	:	
	:	Docket No. WEVA 2008-1084
RUSCAT ENTERPRISES, INC.	:	A.C. No. 46-07366-138992

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”).<sup>1</sup> On May 12, 2008, the Commission received from Ruscat Enterprises, Inc. (“Ruscat”) a letter seeking to reopen penalty assessments that may have 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).

On January 9, and February 6, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000135717 and 000138992, respectively, to Ruscat, proposing civil penalties for several citations. Ruscat states that it never received the original proposed assessment forms. It alleges that it received copies of the proposed assessments only after it received delinquency notices from MSHA seeking payment of the penalties. While the Secretary states that she does not oppose Ruscat’s request to reopen, she

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. WEVA 2008-1083 and WEVA 2008-1084, as both dockets involve similar procedural issues and similar factual backgrounds.

notes that the proposed assessments were sent by Federal Express to Ruscat's address of record, but were returned undelivered because of an incorrect address.

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).

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 Ruscat's official address of record at the time of assessment and whether Ruscat maintained its correct address with MSHA. If MSHA sent the proposed assessment to Ruscat's official address of record, grounds may exist for denying Ruscat'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 Ruscat's request may be moot.

Having reviewed Ruscat's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Ruscat timely contested the penalty proposals. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Ruscat'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. *See Mass Transport, Inc.*, 30 FMSHRC \_\_\_, slip op. at 3-4, No. WEVA 2008-425 (Nov. 6, 2008).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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