

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 4, 2020

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2019-0278-M
v. : A.C. No. 02-00024-480570
 :
FREEPORT-MCMORAN MORENCI INC. :

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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. (2018) (“Mine Act”). On April 17, 2019, the Commission received from Freeport-McMoRan Morenci Inc. (“Freeport”) a motion seeking 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).

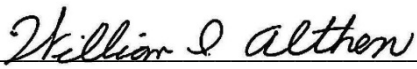
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on January 14, 2019, and became a final order of the Commission on February 13, 2019. During that time, Freeport alleges that it was short-staffed due to the resignation of two employees in its industrial hygiene program and that its Superintendent for Health & Safety, who is responsible for reviewing MSHA’s proposed assessments, was also covering the tasks of the industrial hygiene program. Freeport believed it had followed its typical procedure, which is to forward proposed assessments it intends to contest to outside counsel. However, on April 4, 2019, having failed to timely contest or pay the assessment, MSHA sent a delinquency notice to Freeport. Upon receipt of MSHA’s delinquency notice, Freeport’s Superintendent promptly sent the notice to its outside counsel who also promptly filed a motion to reopen the final penalty assessment. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

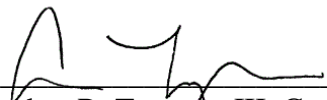
Having reviewed Freeport’s request and the Secretary’s response, we find that Freeport failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. In the interest of justice, we hereby reopen this matter 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. 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.



Marco M. Rajkovich, Jr., Chairman



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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