

February 2021

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No Review was granted or denied during the month of February 2021

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

February 22, 2021

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

SOUTHERN AGGREGATES LLC

Docket No. CENT 2018-0403

A.C. No. 16-01551-466607

BEFORE: Traynor, Chair; Althen and Rajkovich, 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. (2012) (“Mine Act”). On August 6, 2018, the Commission received from Southern Aggregates LLC (“Southern Aggregates”) 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 June 12, 2018, and became a

final order of the Commission on July 12, 2018. The operator had failed to timely contest the proposed assessment, apparently due to its mistaken belief that there was a pending informal conference with MSHA that stayed its obligation to do so. Upon discovering its error during an internal review, the operator engaged with its legal counsel and submitted the Notice of Contest on July 18, 2018, only six days after the final order date. *See* Operator Ex. F. Furthermore, an affidavit from the mine’s safety representative states that the operator has since “created” a “procedure . . . to ensure that citations which Southern Aggregates intends to challenge are contested within 30 days of receipt of the Proposed Assessment, even any citations which are subject to a pending informal conference.” *See* Operator Ex. A.

The Secretary does not dispute any of these facts in opposing the operator’s motion to reopen, but argues that the operator “fails to satisfy [the] . . . requirements . . . for obtaining reopening,” which involve providing an account of the “relevant dates,” a “clear explanation” for its failure to timely contest the penalty, the submission of supporting “affidavits,” and the like. *See* Sec’y Opp Br. It is clear, however, that Southern Aggregates has met these requirements.

Having reviewed Southern Aggregates’ request and the Secretary’s response, we find that the operator made a mistake when it assumed the proposed assessment would not be processed during what it mistakenly believed was an ongoing informal conference process. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Distribution (e-mail):

Nicholas W. Scala, Esq.,
Conn Maciel Carey PLLC,
5335 Wisconsin Ave. NW, Suite 660
Washington, DC 20015
nscala@connmaciel.com

John M. McCracken, Esq.
Office of the Solicitor
Division of Mine Safety and Health
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

Chief Administrative Law Judge Glynn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov