FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 21, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. TERRA EXCAVATING, LLC	Docket No. SE 2025-0001 A.C. No. 09-01264-585667

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 10, 2024, the Commission received from Terra Excavating, LLC ("Terra") 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 delivery of the proposed assessment was attempted on October 27, 2023. The Secretary deemed the assessment a final order of the Commission on November 21,

2023. Terra asserts that it was never served with the proposed assessment. Although sent to the operator's address of record, USPS records show that the proposed assessment was stamped "Return to Sender, Not Delivered as Addressed, Unable to Forward."[1] There is no evidence that the Secretary attempted to resolve the delivery issue or otherwise notify Terra when she became aware that the initial mailing attempt failed.

The Mine Act plainly sets forth the procedure for contesting proposed penalties and establishes when service of a penalty assessment is effective. Section 105(a) states that "[i]f, within 30 days from the *receipt* of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty. . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a) (emphasis added). Here, the evidence clearly indicates that Terra never received the assessment and thus, did not have an opportunity to notify the Secretary that it intended to contest the assessment. *See Beelman Truck Co.*, 40 FMSRHC 1104 (Aug. 2018) (finding a motion to reopen moot when the proposed assessment was returned unclaimed).

Having reviewed Terra's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator never received the assessment. This obviates any need to invoke Rule 60(b).

Accordingly, the operator's motion to reopen is moot, and this case is remanded 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.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

[1] The Secretary does not allege that the operator refused service, failed to update its address of record, or provided an address that did not exist. *See, generally,* 30 C.F.R. § 41.30. In a sworn affidavit attached to its motion to reopen, the owner of the company attests that the address of record, 1760 Gordon Highway, Augusta, Georgia 30904, is correct.

Commissioner Marvit, concurring:

I write to agree the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC __, No. CENT 2024-0122 (Dec. 4, 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC __, slip op. at 3, No. WEVA 2024-0036 (Dec. 5, 2024) (citing *Hancock Materials, Inc*., 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the operator never received the proposed order. As such, the Commission's order did not become final under the language of section 105(a). Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority as the Commission is not reopening the matter.

Moshe Z. Marvit, Commissioner

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