

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

September 9, 2010

SECRETARY OF LABOR,	:	Docket No. CENT 2008-735-M
MINE SAFETY AND HEALTH	:	A.C. No. 41-04518-157473
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2008-736-M
	:	A.C. No. 41-04518-140610
v.	:	
	:	Docket No. CENT 2009-612-M
	:	A.C. No.41-04518-147703
	:	
PETRA MATERIALS	:	Docket No. CENT 2009-681-M
	:	A.C. No. 41-04518-172147

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”).<sup>1</sup> On September 5, 2008, July 10, 2009, July 30, 2009, and August 10, 2009, the Commission received from Petra Materials (“Petra”) letters seeking to reopen 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).

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*

---

<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2008-735-M, CENT 2008-736-M, CENT 2009-612-M, and CENT 2009-681-M, all captioned *Petra Materials* and involving similar facts and procedural issues. 29 C.F.R. § 2700.12.

*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).

On February 14, April 17, July 17, and December 18, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment Nos. 000140610 (Docket No. CENT 2008-736-M), 000147703 (Docket No. CENT 2009-612-M), 000157473 (Docket No. CENT 2008-735-M), and 000172147 (Docket No. CENT 2009-681-M), respectively, to Petra for various citations. On September 5, 2008, the Commission received a request to reopen Proposed Assessment Nos. 000140610 and 000157473 (Docket Nos. CENT 2008-736-M and 2008-735-M), in which Petra stated that the date to contest the penalties had passed because it “did not know the procedures.”

On September 30, 2008, the Commission received an opposition from the Secretary, in which the Secretary stated that the operator made no showing of circumstances that warrant reopening. In addition, as to Docket No. CENT 2008-736-M, the Secretary noted that MSHA notified Petra by letter dated May 14, 2008, that it was delinquent in paying the proposed assessment and that Petra failed to explain why it took three months to seek relief.

On January 22, 2009, the Commission issued an order denying without prejudice Petra’s motion to reopen. 31 FMSHRC 47, 49 (Jan. 2009). The Commission explained that Petra failed to provide a sufficiently detailed explanation for its failure to contest Proposed Penalty Assessment Nos. 000140610 and 000157473 and its delay in responding to the delinquency notice. *Id.* The Commission further explained that Petra could submit another request to reopen the penalty assessments. *Id.*

On July 10, 2009, the Commission received a letter from Petra requesting that “cases 2008158701A and 2008201924A” be reopened. Petra explains that it never received the original correspondence, so it failed to contest the proposed penalties prior to the 30-day deadline. It explains that it was unaware that penalties were owed until it received a notice from a private collection agency that had been contracted by the U.S. Department of the Treasury. The case numbers referred to by Petra are Treasury reference numbers and refer to Proposed Assessment No. 000140610 or Docket No. CENT 2008-736-M (No. 2008158701A) and Proposed Assessment No. 000147703 or Docket No. CENT 2008-612-M (No. 2008201924A).

On July 30, 2009, the Commission received from Petra a request to reopen Proposed Assessment No. 000172147 (Docket No. CENT 2009-681-M). In the request, Petra explains that the proposed assessment was mailed to its previous address, although “a change of address was submitted to your office.” Petra further states that the operator’s address of record at the U.S. Department of Treasury is listed as “1500 E. Fourth Avenue, and it should be 1600 E. Fourth Avenue.” It notes that it received a document dated September 10, 2008, regarding Docket Nos. CENT 2008-735-M and CENT 2008-736-M, which showed its correct address so it does not understand why MSHA’s correspondence continues to be mailed to its previous address.<sup>2</sup>

On August 4, 2009, the Commission received the Secretary’s opposition to Petra’s July 10 motion to reopen. As to Docket No. CENT 2008-736-M, the Secretary notes that the operator’s July 10 reason for its failure to timely contest differed from the reason set forth in its September 5 request, and that a motion for reconsideration cannot be based on grounds that could have been raised, but were not raised, in the original motion. The Secretary further states that MSHA’s records show that Proposed Assessment No. 000140610 was delivered to the operator’s address of record on February 22, 2008, and was signed for by P. Cortez, and that MSHA mailed the delinquency notice. As to Docket No. CENT 2009-612-M, the Secretary states that Petra makes no showing of circumstances that warrant reopening, and that MSHA’s records show that Proposed Assessment No. 000147703 was received by the operator on April 21, 2008, and signed for by J. Barlow. Accordingly, the Secretary requests that Petra’s request to reopen be denied.

On August 10, 2009, the Commission received a letter from Petra in which Petra requests that “cases 000157473 and 000140610” be reopened and specifies which citations it wishes to contest. The operator further states that its managing office was not properly notified of the citations and assessments because correspondence from MSHA, including delinquency notices, were sent to a Diamondhead Road address instead of to Petra’s office address (1600 E. Fourth Avenue), which resulted in delays in the operator’s response. Petra further notes that the delinquency notice in Docket No. CENT 2008-736-M was signed for by Patricia Cortez, who was not an agent of the operator. Petra attached various documents to its request, including a letter dated July 25, 2008, addressed to MSHA, enclosing payment for the penalty associated with Proposed Assessment No. 000147703 (Docket No. CENT 2008-612-M), and requesting that MSHA change Petra’s address to 1600 East Fourth Avenue. The operator also attached a letter from MSHA to Petra at “1500 4th St.” enclosing blank MSHA legal identity forms.

On August 14, 2009, the Commission received a response from the Secretary to Petra’s July 30 request to reopen Proposed Assessment No. 000172147 (Docket No. CENT 2009-681-M). In the response the Secretary states that she does not oppose reopening the proposed assessment. She notes, however, that proposed assessments that are mailed to the operator’s address of record are properly served, and that the operator should take any steps

---

<sup>2</sup> It appears that the September 10 document referred to by Petra is a docketing notice issued by this Commission, rather than by MSHA.

necessary to update its changes of address by submitting an updated Legal Identity Report form with MSHA.

**Proposed Penalty Assessment Nos. 000140610 and 000157473 (Docket Nos. CENT 2008-736-M and 2008-735-M, respectively)**

Consistent with the operator's statements, it appears from the record that there may have been problems with the operator's receipt of Proposed Assessment Nos. 000140610 and 000157473. The Legal Identification Report filed by the Secretary lists Petra's address of record as a Diamondhead Road address. The operator states that it was not timely in contesting Proposed Assessment Nos. 000140610 and 000157473 because both proposed assessments and delinquency notice as to the former had been sent to the operator's previous address. It appears that the operator attempted to change its address of record with MSHA by letter dated July 25, 2008.

As to Docket No. CENT 2008-736-M, it appears that Proposed Assessment No. 000140610 (issued on February 14, 2008), and MSHA's notice of delinquency (dated May 14, 2008) were sent before the operator attempted to change its address with MSHA. However, Proposed Assessment No. 000140610 may not have been received by the operator if it had been signed for by a person who is not an agent of the operator, as Petra alleges.

As to Docket No. CENT 2008-735-M, it appears that Proposed Assessment No. 000157473 was issued on July 17, 2008, close to the time that the operator attempted to change its address of record with MSHA. The circumstances surrounding the receipt of Proposed Assessment No. 000157473 are not set forth in the record. Thus, it is possible that the operator never received the proposed assessment or that the operator attempted to change its address before the proposed assessment was delivered to the Diamondhead address.

If MSHA sent the proposed assessments to Petra's official address of record and the proposed assessments were received by an agent of the operator, grounds exist for denying Petra'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 or if the proposed assessment was received by someone who is not an agent of the operator, the proposed assessments may not have become final Commission orders and Petra's request may be moot.

Having reviewed Petra's motions and the Secretary's responses, we remand this matter to the Chief Administrative Law Judge for a determination of whether the proposed assessments became final orders and, if so, whether the final orders should be reopened. The Judge shall order further appropriate proceedings in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

**Proposed Assessment No. 000147703 (Docket No. CENT 2009-612-M)**

Although Petra requested in its July 10 letter that cases 2008158701A (Docket No. CENT 2008-736-M) and 2008201924A (Docket No. CENT 2008-612-M) be reopened, it appears from the record that Petra erred in requesting the reopening of Docket No. CENT 2008-612-M. Rather, from its August 10, 2009, correspondence, it appears that Petra had intended to request reopening of Docket Nos. CENT 2008-735-M and 2008-736-M. In fact, Petra attached a letter to its July 10 request that appears to be payment of the only proposed penalty set forth in Proposed Assessment No. 000147703. Accordingly, we find Petra's request to reopen Proposed Assessment No. 000147703 to be moot and hereby deny it.

**Proposed Assessment No. 000172147 (Docket No. CENT 2009-681-M)**

It appears from the record that MSHA sent Proposed Assessment No. 000172147 to an incorrect address. The operator attempted to change its address with MSHA by letter dated July 25, 2008, to "1600 E. Fourth Avenue." However, MSHA sent Proposed Assessment No. 000172147 to "1500 4th St." The operator states that it never received the proposed assessment until it was faxed to Petra on July 22, 2009. We consider Petra's July 30 request to reopen to be a timely contest of Proposed Assessment No. 000172147. Therefore, the proposed assessment did not become a final order of the Commission and the request to reopen is moot. This case, Docket No. CENT 2009-681-M, shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

---

Mary Lu Jordan, Chairman

---

Michael F. Duffy, Commissioner

---

Michael G. Young, Commissioner

---

Robert F. Cohen, Jr., Commissioner

---

Patrick K. Nakamura, Commissioner

Distribution:

Raul Villa  
Petra Materials  
1600 E. Fourth Ave.  
El Paso, TX 79901

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. Dept. of Labor  
1100 Wilson Blvd., 25<sup>th</sup> 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