FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 9, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	: :	Docket No. CENT 2010-105-M A.C. No. 41-03721-168103
FROST CRUSHED STONE COMPANY	:	

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"). On October 30, 2009, the Commission received from Frost Crushed Stone Company ("FCS") 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 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 November 5, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000168103 to FCS. FCS states that it mistakenly paid the assessment after it had a conference on the citations at which MSHA refused to make any changes to the citations and informed FCS that it was strictly liable. FCS states that it erroneously believed that it had no other recourse but to pay the assessment. FCS states that it has been named the defendant in a civil suit involving the incident which is the subject of the citations and was not aware of the legal consequences of its payment of the penalties.

The Secretary opposes FCS's request to reopen. She states that the proposed assessment form, MSHA's regulations, the Commission's Procedural Rules, and the Mine Act all clearly explain the operator's right to contest the citations and assessment and that ignorance of the law is not a sufficient basis for relief. She notes that FCS was represented by counsel at the conference. She also states that FCS failed to explain the 11-month delay in filing its request to reopen. Finally, the Secretary contends that the subsequent adverse legal consequences of FCS's failure to contest the penalty assessment in a timely manner is not a valid excuse for its failure.

FCS replies that its request to reopen is based on Rule 60(b)(3), which includes "fraud . . . , misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3). FCS explains that it was misled by the Secretary's representative and did not understand its contest rights. FCS explains that it had never contested a citation previously and did not know that it could contest the fact of the violation and related findings in challenging the penalty assessment. FCS states that the delay in filing its request to reopen was due to the fact that its misunderstanding only came to light in addressing the related civil suit and that the final order, which is now the basis of the pending civil suit, could adversely affect its ability to remain in business.

Although FCS claims that it mistakenly paid the penalty assessment because it did not understand its right to challenge the violations and related findings in contesting the assessment, it was represented by counsel at the time it had the opportunity to contest the citations and penalty assessment. Moreover, FCS seeks reopening only after it has been named the defendant in a civil suit involving the same matter which is the subject of the citations.

Based on FCS's submissions and because FCS waited over 11 months to request relief with regard to Proposed Assessment No. 000168103, we conclude that FCS has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny FCS's request to reopen.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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