

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 2010

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. CENT 2010-346-M |
| | : | A.C. No. 41-04474-187306 |
| v. | : | |
| | : | Docket No. CENT 2010-347-M |
| | : | A.C. No. 41-04474-196142 |
| LONE STAR AGGREGATES | : | |
| ACQUISITION, LLC | : | |

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 January 5, 2010, the Commission received requests to reopen two penalty assessments issued to Lone Star Aggregates Acquisition, LLC (“Lone Star”) that became final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-346-M and CENT 2010-347-M, both captioned *Lone Star Aggregates Acquisition, LLC*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 April 16, and July 14, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 6470620 and 6470664, respectively, to Lone Star. On June 9, and September 8, 2009, MSHA issued Proposed Assessment Nos. 000187306 and 000196142, respectively, to Lone Star, which proposed civil penalties for Citation Nos. 6470620 and 6470664, and other citations. Lone Star states that at around the time of the issuance of the citations, Fred Weber, Inc. (“Weber”) had recently acquired the mine property. The vice president for safety of Lone Star and Weber states that, at the time, the sharing and forwarding of information and recordkeeping and the replacement of the workforce was ongoing and, consequently, he was not aware of the proposed assessments. The operator states that on December 16, 2009, it received a delinquency notice regarding Proposed Assessment No. 000196142. It explains that on approximately December 21, 2009, the operator called MSHA and was informed for the first time by return call on December 28, that the proposed penalty assessments related to both citations had become final orders.

The Secretary opposes Lone Star’s request to reopen. She explains that according to MSHA’s records, Weber took over the mine on February 6, 2009, four and seven months before the proposed assessments were delivered. The Secretary states that by the time that the proposed assessments were delivered, the operator should have had adequate procedures in place for processing the proposed assessments. The Secretary also notes that, contrary to the operator’s assertion that it learned of the final orders for the first time on December 28, a delinquency notice was sent to the operator on September 3, 2009 (Proposed Assessment No. 000187306) and December 9, 2009 (Proposed Assessment No. 000196142).

Having reviewed Lone Star’s request to reopen and the Secretary’s response thereto, we agree that Lone Star has failed to provide an adequate basis for the Commission to reopen the penalty assessment. Lone Star has failed to adequately explain its failure to timely contest the proposed assessments when the change in ownership occurred four and seven months before it received the proposed assessments. Furthermore, Lone Star has failed to explain the circumstances surrounding its receipt of the September delinquency notice.²

² In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

Accordingly, we hereby deny without prejudice Lone Star's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Lone Star may submit another request to reopen the assessments.³ Any amended or renewed request by Lone Star to reopen Assessment Nos .000187306 and 000196142 must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

³ If Lone Star submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Lone Star should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Lone Star should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting.

Distribution:

Jason Bish, V. Pres., - Safety
Lone Star Aggregates, / Fred Weber, Inc.
2320 Creve Coeur Mill Rd.
Maryland Heights, MO 63043

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., 25th 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