

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 29, 2010

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

v.

BASIC MATERIALS CORPORATION

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Docket No. CENT 2010-392-M  
A.C. No. 13-02381-197853 H8Y

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 21, 2010, the Commission received from Basic Materials Corporation (“Basic”) a letter 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 September 22, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000197853 to Basic, proposing a civil penalty for Citation No 6494830. The safety director of BMC Aggregates LC ("BMC")<sup>1</sup> explains that after BMC received the proposed assessment on September 29, 2009, he sent a contest of the proposed penalty to an MSHA district office rather than to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. After discovering the error, BMC promptly filed a request to reopen. The Secretary does not oppose the request to reopen.

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<sup>1</sup> The request to reopen was filed by Kurt J. Behrens, who identifies himself as an engineer/safety director of BMC. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which includes parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Behrens satisfied the requirements of Rule 3 when he filed the request on behalf of Basic. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Behrens may represent Basic only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, Basic must be represented by an attorney or by an owner, partner, officer, or employee.

Having reviewed Basic's request and the Secretary's response, in the interests 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.

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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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