

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 10, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-88-M
v.	:	A.C. No. 23-02274-192621
	:	
RAY COUNTY STONE	:	
PRODUCERS, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 28, 2009, the Commission received a request to reopen a penalty assessment issued to Ray County Stone Producers, LLC (“Ray County”) 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 July 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000192621 to Ray County for three citations MSHA had issued to the operator on June 2, 2009. The request to reopen states that the employee who signed for the assessment when it was delivered never forwarded it for action by the operator. Ray County wishes to reopen the assessment so that it can try to reach a settlement of the penalties. The Secretary of Labor states that she does not oppose reopening in this instance.

Having reviewed Ray County's request and the Secretary's response, we conclude that Ray County has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Accordingly, we deny without prejudice Ray County's

request. See *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ “Without prejudice” means that Ray County may submit another request to reopen the assessment so that it can contest the citations and penalty assessments. In the event that Ray County chooses to refile its request to reopen, it should provide more specific information regarding why it did not file a notice of contest on a timely basis, and when it learned of the delinquency. Ray County should also specify which of the penalties it wishes to contest upon reopening.

The request to reopen was sent by Earl Wilson, who describes himself as a “Safety Consultant.” 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 include 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. Wilson satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Wilson must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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