

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

June 1, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. CENT 2011-193-M
v.	:	A.C. No. 23-00078-230288
	:	
CON-AGG OF MO, 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 November 18, 2010, the Commission received a request to reopen a penalty assessment issued to Con-Agg of MO, LLC. (“Con-Agg”) that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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.

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<sup>1</sup> On November 15, 2010, Con-Agg filed a letter with the Commission entitled “Notice of Contest” of Citation No. 6473993. We are treating Con-Agg’s letter as a request to reopen a proposed penalty assessment.

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 August 31, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000230288 to Con-Agg for six citations issued to the operator in July 2010. Con-Agg states that it first had constructive notice of the “citation” on November 8, 2010, and received actual notice on November 12, 2010.

The Secretary opposes reopening because MSHA records show that the proposed assessment was delivered to Con-Agg via Federal Express on September 7, 2010. The Secretary notes that except for Con-Agg’s suggestion that it did not receive the proposed assessment, the operator does not explain why it failed to contest the proposed assessment within 30 days of receiving it.

Having reviewed the operator’s request to reopen and the Secretary’s response thereto, we agree that Con-Agg has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The record indicates that Con-Agg received the proposed assessment on September 7, 2010, and was notified that it had 30 days from that date within which to contest the proposed assessment. Accordingly, we hereby deny without prejudice Con-Agg’s request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words “without prejudice” mean that Con-Agg may submit another request

to reopen Assessment No. 000230288.<sup>2</sup> Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

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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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<sup>2</sup> If Con-Agg 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. Con-Agg 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. Con-Agg should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. In addition, Con-Agg should indicate when it first became aware that it had missed the contest deadline and whether it acted promptly in filing its motion to reopen.

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