

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 15, 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 June 30, 2011, the Commission received a renewed request to reopen a penalty assessment issued to Con-Agg of MO, LLC (“Con-Agg”) 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 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. The operator failed to timely contest the proposed assessment. In its first request to reopen filed November 15, 2010, Con-Agg stated that it first had constructive notice of the "citation" on November 8, 2010, and received actual notice on November 12, 2010. The Secretary opposed the motion on the grounds that the proposed assessment was delivered to Con-Agg and signed for on September 7, 2010, and that the operator failed to explain its failure to timely contest the assessment. The Commission subsequently denied the request without prejudice for Con-Agg's failure to provide a sufficiently detailed explanation for its failure to timely contest the proposed assessment. *See Con-Agg of Mo, LLC*, 33 FMSHRC ____, slip op. at 2, No. CENT 2011-193-M (June 1, 2011).

In its June 30, 2011, renewed request, Con-Agg states that it first became aware of the proposed assessment on November 8, 2010, when Con-Agg's mine manager discovered the proposed assessment while checking MSHA's database system. After an unsuccessful internal search for the proposed assessment, Con-Agg contacted MSHA and on November 12 received a copy of the proposed assessment. The person responsible for receiving packages for Con-Agg at that time maintains that she does not remember receiving a package from MSHA. Con-Agg further states that there was disruption in the company during that time because the mining operation was in the process of being sold and transferred. In addition, the package would have been addressed to and received by one of the prior owners, Larry Moore, who states that he never saw the assessment from MSHA. Con-Agg asserts that to date it has not located the original proposed assessment from MSHA. Con-Agg paid the remaining citations that it did not intend to contest on November 9, 2010, and on November 15, 2010, filed a letter with MSHA attempting to contest the remaining Citation No. 6473993. Con-Agg further states that on January 4, 2011, it previously filed a Motion to Permit Late Contest Filing. This motion, however, was not associated with the proper case file by the Commission.

On July 8, 2011, the Secretary filed a response, stating that she does not oppose the renewed request for reopening.

Having reviewed Con-Agg's requests 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Patrick Short, Mngr.
Con-Agg of Mo., LLC
2604 North Stadium Blvd.
Columbia, MO 65202-1271

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
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