# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 23 2011

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. SE 2011-349-M |
| ADMINISTRATION (MSHA) | : | A.C. No. 09-01038-188254 |
| | : | |
| v. | : | |
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| CARMEUSE LIME AND STONE | : | |
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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 February 25, 2011, the Commission received a motion by counsel for Carmeuse Lime and Stone ("Carmeuse") requesting that the Commission 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 June 17, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Carmeuse the proposed penalty assessment at issue. Carmeuse claims that it timely sent the contest form to MSHA's Civil Penalty Compliance Office in Arlington, Virginia, and that MSHA has erroneously determined that it did not receive the contest form. Its assertion that the contest form was timely filed is based on an affidavit of its safety manager.

The Secretary opposes the request to reopen. Although she acknowledges that MSHA timely received payment for the other penalties contained in the proposed assessment, she states that there is no record of MSHA receiving the contest form and no independent evidence that the contest form was sent. She further states that the penalties at issue became a final order on July 23, 2009. Although the Secretary mailed a delinquency notice to the operator at its address of record in September 2009, the notice was returned as undelivered. The case was subsequently sent to the U.S. Department of Treasury for collection, and Carmeuse received two collection notices with respect to the delinquency – one in March 2010 and another in December 2010. The Secretary also points out that the outstanding balance for the penalties ($8,000) was shown on all of the monthly proposed assessments issued to the operator after the case became delinquent. On these grounds, she opposes reopening because Carmeuse did not seek reopening until February 2011 – more than one year and seven months after the proposed assessment became a final order of the Commission, despite receiving collection notices and proposed assessments indicating that the outstanding balance was owed.

In response, Carmeuse argues that because it allegedly filed a timely contest, did not receive the delinquency letter from MSHA, and explained its position to the private collection companies hired by the Treasury Department, reopening should be granted despite the fact that more than a year has passed since the proposed assessment became a final order.

Under Rule 60(c)(1) of the Federal Rules of Civil Procedure, any motion for relief from a final order pursuant to Rule 60(b) must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Here, Carmeuse requests reopening of the proposed assessment more than one year after it became a final Commission order.

We conclude that there is no basis in this case for ignoring the one-year deadline in Rule 60(c)(1). The operator should have been aware that MSHA had determined that it had not received the contest form and that the $8,000 in penalties was overdue. In particular, the fact that the outstanding balance of $8,000 was included on *every* subsequent monthly statement issued to the operator should have alerted a reasonably diligent operator that there was a problem. Moreover, after receiving a notice from a private collection agency in March 2010, stating that the penalties were delinquent, a reasonably diligent operator would have contacted MSHA

promptly to determine what had happened. However, Carmeuse waited an additional ten months before contacting MSHA.

Because Carmeuse did not seek relief from the final order until more than one year had passed, its request is untimely. *Freedom Energy Mining Co.*, 31 FMSHRC 593 (June 2009) (denying request to reopen filed more than one year after penalty proposal had become a final order); *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (same). Accordingly, Carmeuse's request to reopen is denied.

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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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