

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

January 25, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1289-M
v.	:	A.C. No. 15-17075-178181
	:	
	:	Docket No. KENT 2009-1290-M
	:	A.C. No. 15-17075-180774
SPECIALTY ROCK PRODUCTS, INC.	:	

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 July 6, 2009, the Commission received from Specialty Rock Products, Inc. (“Specialty Rock”) a motion by counsel seeking to reopen two penalty assessments that had become final orders 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

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1289-M and KENT 2009-1290-M, both captioned *Specialty Rock Products, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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 inadvertence or mistake. *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 March 3, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000178181 to Specialty Rock, and on April 1, 2009, it issued Proposed Assessment No. 000180774 to Specialty Rock. The operator alleges that it sent its contests of the two proposed assessments to MSHA’s Franklin, Tennessee, office rather than to the correct address of MSHA’s Civil Penalty Compliance Office in Arlington, Virginia, as indicated on the proposed assessment forms. The contests were apparently sent within the 30-day time period for contesting proposed assessments although they were sent to the wrong office.<sup>2</sup> The Secretary does not oppose the operator’s request to reopen.

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<sup>2</sup> The operator also alleges that it attempted to contest two citations (Citation Nos. 7771505 and 7771504) which were not assessed penalties in the proposed assessments that it seeks to reopen. It attached to its request to reopen a letter to MSHA requesting a conference on those citations, a response from MSHA instructing the operator that a conference would be scheduled once it contested the proposed assessment related to those citations, and its response contesting the citations. There is nothing in the record before us indicating if, or when, MSHA issued proposed assessments on these two citations, or the operator’s response to such proposed assessments, if issued. The operator does not appear to request any relief with regard to the two citations.

Having reviewed Specialty Rock's request and the Secretary's response, in the interests of justice, we hereby reopen Penalty Assessment Nos. 000178181 and 000180774 and remand the matter 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. 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.<sup>3</sup>

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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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<sup>3</sup> As to Citation Nos. 7771505 and 7771504, based on the operator's submission, the status of these two violations is unclear from the record. Because the operator does not request relief with regard to the citations, we do not address the question of whether any relief should be granted.

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