

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 25, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2009-265-M
	:	A.C. No. 47-00792-173702
v.	:	
	:	Docket No. LAKE 2009-694-M
CEDAR LAKE SAND & GRAVEL CO.	:	A.C. No. 47-00792-175338

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 September 4, 2009, the Commission received from Cedar Lake Sand & Gravel Co. (“Cedar Lake”) a request to 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).¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2009-265-M and LAKE 2009-694-M, both captioned *Cedar Lake Sand & Gravel Co.*, and both involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 October 17, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 7840542, 7840543, and 7840547 to Cedar Lake. On November 17, 2008, Cedar Lake’s counsel filed notices contesting the three citations pursuant to 29 C.F.R. § 2700.20. The notices of contest for Citation Nos. 7840542, 7840543, and 7840547 were docketed in LAKE 2009-101-RM, LAKE 2009-102-RM, and LAKE 2009-103-RM, respectively, and those contest proceedings were stayed.

On January 6, 2009, MSHA issued Proposed Assessment No. 000173702 to Cedar Lake, proposing civil penalties for Citation Nos. 7840542 and 7840543. The operator timely contested the proposed penalties pursuant to 29 C.F.R. § 2700.26. The Secretary moved for an extension of time to file a petition for assessment of penalty for the citations, and the motion was granted. On June 8, 2009, the Secretary filed a petition for assessment of penalty, pursuant to 29 C.F.R. § 2700.28, and the matter was docketed as a civil penalty proceeding in LAKE 2009-265-M. After Cedar Lake failed to file an answer to the petition for assessment of penalty, Chief Administrative Law Judge Robert J. Lesnick issued an order on November 9, 2009, directing Cedar Lake to file an answer within 30 days of the date of that order or to show good reason for its failure to do so. The Judge stated that, otherwise, Cedar Lake will be placed in default and ordered to pay the amount of the proposed penalties.

On January 27, 2009, MSHA issued Proposed Assessment No. 000175338 to Cedar Lake, proposing a civil penalty for Citation No. 7840547. Cedar Lake did not timely contest the proposed penalty, and the proposed assessment became a final order of the Commission pursuant to section 105(a) of the Mine Act. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.27.

On September 4, 2009, the Commission received a letter from Cedar Lake’s counsel requesting that the Commission reopen all proposed penalty assessments related to Citation Nos. 7840542, 7840543, and 7840547. Counsel explains that he entered his appearance as counsel when he filed the contests of the citations in November 2008, but that counsel received no subsequent filings from MSHA. The operator’s counsel submits a contest of the proposed penalty assessments in the event the Commission grants Cedar Lake’s request to reopen. The Secretary does not oppose the operator’s motion.

The Mine Act sets forth a scheme of dual filing relating to contests of citations and orders (29 C.F.R. Part 2700, Subpart B), and contests of proposed penalties (29 C.F.R. Part 2700, Subpart C). The filing of a contest of a citation does not constitute a challenge to a proposed penalty for that citation. *See* 29 C.F.R. § 2700.21(a) (“The filing of a notice of contest of a citation or order issued under section 104 of the Act . . . does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act . . . which is based on that citation or order.”); 29 C.F.R. § 2700.26 (“A person

who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation . . .”). Thus, after filing the notices of contest of Citation Nos. 7840542, 7840543, and 7840547 in November 2008, the operator was still required to file contests of the proposed penalties associated with those citations.² The operator timely contested the proposed penalties associated with Citation Nos. 7840542 and 7840543, but failed to do so with respect to the proposed penalty associated with Citation No. 7840547. In addition, to date the operator has not filed an answer to the petition for assessment of penalty filed by the Secretary in Docket No. LAKE 2009-265-M (A.C. No. 47-00792-173702) relating to Citation Nos. 7840542 and 7840543.³

² We note that contests of citations and orders are filed with the Commission, and that MSHA, which is separate from the Commission, issues the proposed penalty assessments. Thus, even if an attorney enters an appearance with the Commission by filing a contest of a citation under 29 C.F.R. Part 2700, Subpart B, MSHA sends a proposed penalty assessment to the operator’s address of record listed with MSHA.

³ Pursuant to our rules, when an operator wishes to contest a penalty assessment, it must notify the Secretary. Commission Procedural Rule 26, 29 C.F.R. § 2700.26. However, after an operator successfully contests a penalty assessment by notifying the Secretary, the Secretary files a penalty petition with the Commission, and then the operator must file an answer to that petition. Commission Procedural Rule 29, 29 C.F.R. § 2700.29. The “answer” submitted by the operator in this case does not satisfy the requirement of Rule 29, as it does not respond to a penalty petition.

Having reviewed Cedar Lake's request and the Secretary's response, in the interests of justice, we hereby reopen Proposed Penalty Assessment No. 000175338 relating to Citation No. 7840547 (LAKE 2009-694-M). We remand this 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. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order relating to Proposed Penalty Assessment No. 000175338, and the operator shall file an answer to that petition within 30 days after service of the petition. *See* 29 C.F.R. §§ 2700.28, 2700.29. The operator must also file an answer to the petition for assessment of penalty filed relating to Proposed Assessment No. 000173702 for Citation Nos. 7840542 and 7840543 (LAKE 2009-265-M) within 30 days of the date of this order. *See* 29 C.F.R. § 2700.29.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

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