

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

May 6, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

SWINSON MATERIALS, INC.

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Docket No. LAKE 2010-355-M
A.C. No. 11-03120-200607

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 January 19, 2010, the Commission received from Swinson Materials, Inc. (“Swinson”) a letter seeking 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).

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 October 15, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000200607 to Swinson, proposing civil penalties for four citations and one order. The operator's counsel states that Swinson did not receive a copy of the "final order" and was not aware of it until receipt of a fax on December 18, 2009.

The Secretary states that the proposed penalty assessment was received and signed for by the operator on October 21, 2009, and provides a Federal Express document to support this statement. She opposes the request to reopen on the ground that the operator does not explain why it failed to contest the proposed assessment that it received and makes no showing of any circumstances that warrant reopening.

Having reviewed Swinson's request to reopen and the Secretary's response, we agree with the Secretary that Swinson has failed to provide a sufficient explanation for its failure to timely contest the proposed penalty assessment. Swinson's conclusory statement that it did not receive a copy of the final order and was not made aware of the final order until December 18, 2009, does not explain why it failed to contest the proposed assessment that it received on October 21, 2009, in a timely manner. Thus, the operator has failed to provide the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Swinson's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).¹

¹ If Swinson submits another request to reopen the case, it must establish good cause for not contesting the proposed assessment within 30 days from the date it received the proposed penalty 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. Swinson should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Swinson from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Swinson should submit copies of supporting documents with its request to reopen the case. Finally, Swinson should clarify which citations and proposed penalties it intends to contest.

Any amended or renewed request by Swinson to reopen Assessment No. 000200607 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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