FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. PENN 2009-408-M
	:	A.C. No. 36-07747-172956
QUALITY AGGREGATES, INC.	:	

BEFORE: Duffy, Chairman; Jordan, 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 March 30, 2009, the Commission received from Quality Aggregates, Inc. ("Quality") a motion by counsel 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).

Quality states that, following its receipt of the proposed assessment on or about January 12, 2009, its safety director, who was responsible for reviewing the document, was out of the office on vacation for a week. Following his return, the safety director was generally away from Quality's home office on training and other work duties during the next eight days. Quality further states that on February 3, 2009, it received a letter from MSHA dated January 23, 2009 which vacated two citations that were included in the proposed assessment. Quality asserts that its safety director mistakenly believed that he would receive another assessment that would reflect the vacated citations.

The Secretary opposes reopening the proposed penalty assessment, maintaining that Quality has failed to establish the existence of "exceptional circumstances." Specifically, the Secretary contends that for the period up to February 3, 2009, Quality's "inadequate or unreliable internal procedures" do not justify reopening. The Secretary is silent as to the period beginning February 3, 2009.

We find that the reasons advanced by Quality for not contesting the proposed assessment between January 12 and February 3, 2009 are essentially irrelevant. As of February 3, 2009, when the safety director had focused on the proposed assessment, Quality still had 11 days within which to contest it. Thus, the issue is whether the safety director's mistaken belief that he would receive another proposed assessment, reflecting the amended citations, was reasonable. In this regard, we note that in the letter dated January 23, 2009, MSHA clearly indicated the total amount of the assessment, both before and after the two citations were vacated.

Having reviewed Quality's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Quality's failure to timely contest the penalty and whether relief from the final order should be granted.[1] If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R.§ 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

[1] On remand, the judge should consider whether Quality has met the standard for relief under Rule 60(b) because of its mistaken belief that it was going to receive a revised assessment after two citations on the assessment were vacated.

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