

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-172-M
v.	:	A.C. No. 36-00125-194419
	:	
KEYSTONE CEMENT COMPANY	:	

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 December 8, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Keystone Cement Company (“Keystone”) 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 August 13, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000194419 to Keystone. Keystone asserts that its failure to timely file its contest was the result of confusion because it had submitted a conference request for seven of the citations contained on the proposed assessment. Keystone additionally contends that the error was made by a plant manager without the knowledge of the company's general counsel, who oversees MSHA compliance. Keystone states that it has changed its address of record so that all correspondence will now be sent to the general counsel so as to avoid future mistakes. Keystone promptly filed its motion to reopen after receiving MSHA's rejection of its contest.

The Secretary opposes the request on the ground that the letter acknowledging Keystone's conference request specifically required the operator to contest the penalty assessment and that a conference request does not toll the time to contest a penalty.¹

¹ The Secretary initially also opposed the motion to reopen on the ground that the operator was delinquent in its payment of penalties for the citations it was not seeking to reopen in this assessment case, and thus had not acted in good faith. In response, Keystone stated that the failure to pay stemmed from the same problem as above with the plant manager receiving MSHA correspondence, and that it had paid the uncontested assessments after discovering its error. The Secretary then withdrew her assertion that the operator had acted in bad faith.

Having reviewed Keystone's motion and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it 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. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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